

A Home Owner's Guide to Home Building Variations

Building your dream home is the biggest investment you can make. One of the biggest risks to home owners is increased contract price. Variations affect cost, time, and quality of build. Learn how to manage these risks by being mindful of when Variations are allowable, and what to do if they're not.



For illustration purposes only

What are Variations?

Variations are changes or alterations made to the work, which are outside of, or contrary to, those specified in the scope of works.

These include changes to the:

- Design
- Materials
- Quantities
- Quality
- Work sequence
- Scope of Work

Both the Home Owner and the Builder may request for Variations, provided that they follow the proper procedure laid out in their construction contract, and that both parties agree on the proposed Variations.

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the right legal advice.**

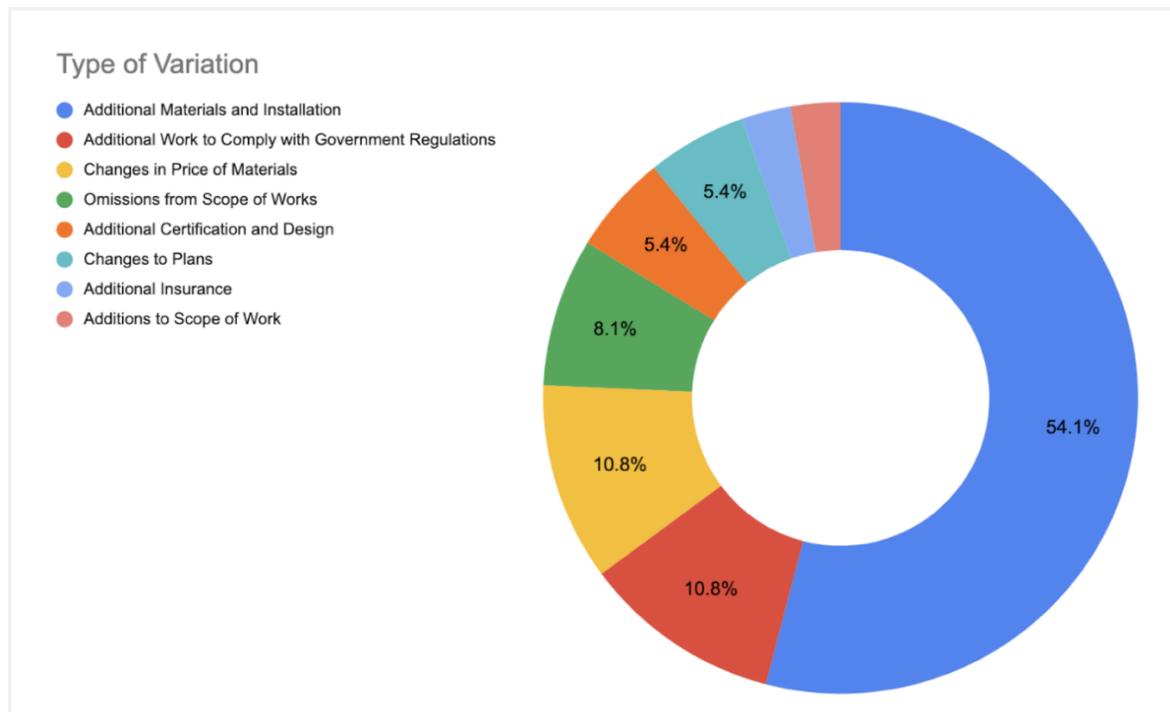
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Examples of Variations

In residential construction in NSW, Variations usually involve changes to, or deviations from the Plans and Specifications.

Our research shows that in 2021, the kinds of Variations that occurred during home building were as follows:

- **Additional Materials and Installations**, which was the most frequently-occurring Variation at 54.1%, followed by:
- **Additional Work to Comply with Government Regulations**
- **Changes in Price of Materials**
- **Omissions from the Scope of Works**
- **Additional Certification and Design**
- **Changes to Plans**
- **Additional Insurance**
- **Additions to the Scope of Works**



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Variations in home building, when proper

Variations are not inherently wrong. Either party is allowed to make requests for Variations, and to be valid, the proposed Variations need to be approved and agreed to by the consenting party.

These procedures should be found in your contract's Variations Clause.



If you're using the [Housing Industry Authority \(HIA\)'s NSW Residential Building Contract for New Dwellings](#), you will find the clause here:

Clause 18. Variations

Variations may change the contract price.

Refer to Clause 40 for Mandatory Conditions.

The builder may ask the owner for evidence of ability to pay for the variation. See Clause 7.2.

- 18.1 A **variation** must be in writing and signed by or on behalf of the **builder** and the **owner**. Either the **owner** or the **builder** may ask for a **variation**.
- 18.2 If the **owner** asks for a **variation**, the **builder** must reply in writing as soon as is reasonable.
- 18.3 The reply is to be either:
- (a) a signed written offer to carry out the **variation** detailing:
 - (i) the work required to carry out the **variation**;
 - (ii) the price of the **variation**; and
 - (iii) any extension of time to the **building period** as a result of carrying out the **variation**; or
 - (b) a refusal to carry out the **variation**. The **builder** does not have to give any reasons for refusing to carry out a **variation**.
- 18.4 If the **owner** does not give to the **builder** signed written acceptance of the **builder's** offer within 5 **working days** of the **builder** giving the reply, the **builder's** offer is deemed to be withdrawn.
- 18.5 If the price of a **variation** is not agreed prior to it being carried out that price includes:
- (a) the deduction of the reasonable cost of all deletions from the **building works**; and
 - (b) the addition of the total cost of all extra work plus the **builder's margin** applied to that cost.
- 18.6 The price of a **variation** is due and payable at the next progress payment after it is carried out unless a different time is agreed.
- 18.7 The **owner** must not unreasonably withhold consent to any **variation** which is required for the **building works** to comply with the law or a requirement of any **statutory or other authority**.
- 18.8 The **owner** acknowledges that the colour and grain of timber, granite and other natural materials can vary. The **builder** is to use reasonable endeavours to match the colour or grain of any sample selected by the **owner** but is under no liability if there is a difference and such difference is not a **variation**.

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If you're using the Master Builders (BC4) Residential Building Contract, you will find what you need to know about Variations in the following clauses:

Conditions of Contract

1. Responsibility of Builder and Results of Construction

(a) The **Builder** will, subject to these Conditions and the work particulars set out in **Schedule 3**, execute and complete the work required by the Contract.
NOTE: Work which is excluded from the contract work but apparent from the contract documents should be listed at Schedule 3 Item 1(i) or otherwise made clear, through the contract details, that such work is excluded from the work the Builder is to carry out.

Statutory Warranties for Residential Building Work

(b) Pursuant to s18B of the Home Building Act 1989 (the "Act") the **Builder** warrants that, in relation to any residential building work as defined by the Act and for the time periods under the Act:

- (i) the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract;
- (ii) all materials supplied by the **Builder** will be good and suitable for the purposes for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (iii) the work will be done in accordance with, and will comply with, the Act or any other law;
- (iv) the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
- (v) if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling;
- (vi) the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purposes for which the work is required or the result that the owner desires the work to achieve, so as to show that the **Owner** relies on the holder's or person's skill and judgment. (Refer to Schedule 2 Item 8)

Further to point (vi) above if a purpose listed in **Schedule 2 Item 8** alters the work to be done relative to the contract drawings then a variation will be involved. If the **Owner** does not sign a variation for such work then the drawings will override any special purpose or result listed at **Schedule 2 Item 8**.
In other words in such circumstances the drawings represent what is required to be done by the **Builder** and

if a special purpose alters that position then a **written** variation must be provided by the **Owner** to the **Builder**. **Clause 14** will then apply.

Plans and specifications

(c) (i) All plans and specifications for work to be done under this contract, including any variations to those plans and specifications, are taken to form part of the contract.
(ii) Any agreement to vary this contract, or to vary the plans and specifications for work to be done under this contract, must be in writing signed by or on behalf of each party to the contract.
(iii) This clause only applies to a contract to which section 74A (Consumer Information) of the Home Building Act 1989 applies.

Quality of construction

(d) (i) All work done under this contract will comply with:
(a) the Building Code of Australia to the extent required under the Environmental Planning and Assessment Act 1979, including any regulation or other instrument made under that Act; and
(b) all other relevant codes, standards and specifications that the work is required to comply with under any law; and
(ii) the conditions of any relevant development consent or complying development certificate.
(e) Despite **Clause 16(d)**, this contract may, and accordingly above, limit the liability of the contractor **Builder** so the **Builder** is not liable for a failure to comply with **Clause 16(d)** if the failure relates solely to:
(i) a design or specification prepared by or on behalf of the **Owner** but not by or on behalf of the contractor **Builder**; or
(ii) a design or specification required by the **Owner**, if the contractor **Builder** has advised the **Owner** in writing that the design or specification contravenes **Clause 16(d)**.

Selection of Registered Certifier

(f) (i) The **Builder** will notify the **Owner** if a registered certifier is required with respect to particular work done under this contract.
(ii) The selection of a registered certifier is the sole responsibility of the **Owner** (subject to section 6.6(4) or 6.12(4A) of the Environmental Planning and Assessment Act 1979).

2A. Joint Responsibilities of the Builder and Owner

The parties acknowledge the fact that the amount payable by the **Owner** under the contract and the time taken to carry out the work is subject to change for various reasons. As at the date of the contract the work

RESIDENTIAL BUILDING CONTRACT 2014 - 2017 - 489 (2017) WALSLEY

14. Variations – How to Deal with Changes to the Work

(a) The works may be varied by such things as:

- (i) execution of additional work;
- (ii) decreases in or omissions from the works;
- (iii) changes in the character or quality of any material or work such as may be necessary due to the existence of a latent condition;
- (iv) changes in the levels, lines, positions or dimensions of any part of the works.

(b) For the sake of clarity a variation is established by:

- (i) **written** instructions from the **Owner** or the **Owner's** representative; and/or
- (ii) the supply to the **Builder** of post contract details such as updated or further plans and drawings and/or specifications; and/or
- (iii) the discovery of an otherwise unknown or latent condition; and/or
- (iv) an instruction issued by a Relevant Authority under **Clause 12**

which alters the work done, the work to be done or requires adjustments to an existing situation or the work which was otherwise expected to be done. Accordingly a variation may, for example, result from such things as a request from the **Owner**, a choice made by the **Owner**, dealing with latent conditions and complying with the requirements of a Relevant Authority.

(c) The **Builder** is not obliged to vary the contract works or carry out any extra work unless the **Builder** consents. Such consent will not be unreasonably withheld.
(d) (i) If the **Builder** agrees to undertake a variation requested or required by the **Owner**, the variation is to be detailed in **writing** and signed by the **Owner** or the **Owner's** agent and the **Builder**. Documents detailing the variation, including as appropriate, amended drawings or specifications, become contract documents.
(ii) The **Builder** may require, prior to the execution of any variation that the **Owner** produce evidence, satisfactory to the **Builder**, of the **Owner's** capacity to pay for the variation.

Builder to Advise Value of Variations

(e) The **Builder**, within a reasonable time of receipt of instructions to execute a variation (in an instruction signed by the **Owner** or **Owner's** agent), is to notify the **Owner**, in **writing**, of the value of the variation.

Less Work due to a variation

(f) Where the works are decreased or omitted the cost of the work not now required is to be deducted from the contract price. Cost in this case means the actual cost of labour, subcontractors or materials served by the

Builder because the work and/or materials is now not required. No other deduction is required by reason of the work or materials being decreased or omitted.

Additional work due to a variation

(g) Where the work to be done is increased, the cost of the extra work is to be added to the Contract Price. The **Builder** can choose when and how often to claim payment for variation work and is not required to wait until the next stage claim.
(h) Where a price has not been previously agreed for additional work, the **Builder** may proceed with the variation work and the price to be paid for the work will be the cost as calculated in accordance with **Clause 14(f)** below, plus the allowance specified in **Schedule 2 Item 1**.
(i) The cost referred to in **Clause 14(f)** above, unless otherwise agreed, will be calculated as follows:
(i) for work, including supervision and administration, by the **Builder** or **Builder's** employees, the rates for such labour are those set out in **Item Schedule 2 Item 2**;
(ii) where the work or some part of it is executed by a sub-contractor, the cost to be paid under **Clause 14(f)** above is the amount properly paid or payable to the sub-contractor which will be established by provision of a proper tax invoice from the sub-contractor engaged to do the extra work;
(iii) the price for materials is the cost of the materials to the **Builder**.
(iv) Any other cost paid by the **Builder** to any third party that is necessary for the carrying out of the variation works.

All Directions Concerning Work are to be Given to the Builder

(j) Neither the **Owner** nor any duly appointed representative will give or be entitled to give at any time directions to the **Builder's** workers or sub-contractors concerning the works or any part thereof. All instructions are to be given to the **Builder** and are to be in **writing**.

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If you're using the [Fair Trading Home Building Contract for Work Over 20,000](#) issued by the NSW government, you will find the relevant clause here:

Explanation: If, after work has commenced, the owner decides to delete, alter or add to the work to be done, a variation to the contract may be required. The work also may be varied at the request of the contractor, due to a requirement of the council or other authority, or a matter which could not be foreseen at the time of signing the contract.

Note: Copies of letters and notices relating to variations should be kept by both parties.

 *Explanation: "Building cover contract" is defined in Clause 30 and relates to insurance or cover under the Home Building Compensation Scheme. The Variations Clause provides for the contractor to adjust the contract price to account for changes in the cost of this insurance or cover compared to the amount stated on page 5 of this contract.*

 *Explanation: Contractors normally include in the price for all work a margin to cover overheads, supervision and profit. The margin to be applied to the adjustment of prime cost items is to be inserted in the box opposite. You should question any margin that exceeds 20% and seek further advice if necessary.*

Clause 13 Variations

The work to be done or materials used under this contract may be varied:

- at the request of the owner, or
- at the request of the contractor. If the necessity for the variation is due to the fault of the contractor the owner will not be liable for any increase in the contract price, or
- due to such other matters that could not reasonably be expected to be foreseen by an experienced, competent and skilled contractor for the completion of the work at the date of the contract, or
- due to a requirement of a council or other statutory authority relating to the work, if at the date of this contract such requirement could not reasonably have been foreseen by the contractor.

Procedure for variations

Before commencing work on a variation, the contractor must provide to the owner a notice in writing containing a description of the work and the price (including separate disclosure of the GST and the component of the price attributable to any consequential increase in the cost of the building cover contract entered into by the contractor in respect of the work to be done under this contract). If not otherwise specified the price will be taken to include the contractor's margin for overheads, supervision and profit. **The notice must then be signed and dated by both parties to constitute acceptance.**

If the time for completion will be delayed by the variation the contractor must include in the notice an estimate of the additional time required. Any extension of time must be dealt with in accordance with Clause 7.

The requirement for variations to be in writing does not apply where, if the work were not to be done promptly there is likely to be a hazard to the health or safety of any person or to the public or to be damage to property and the work could not be done promptly if the variation had to be put in writing before commencing the work.

Variations shall be subject to the overall conditions of this contract.



And, if you're using a **custom contract**, you best make sure there is a clause explaining

- how Variations can be validly made,
- when it becomes a problem,
- and what to do in case it does.

In this case, a thorough [Contract Review](#) by a specialist construction lawyer would be your best best bet.

When Variations in home building become a problem

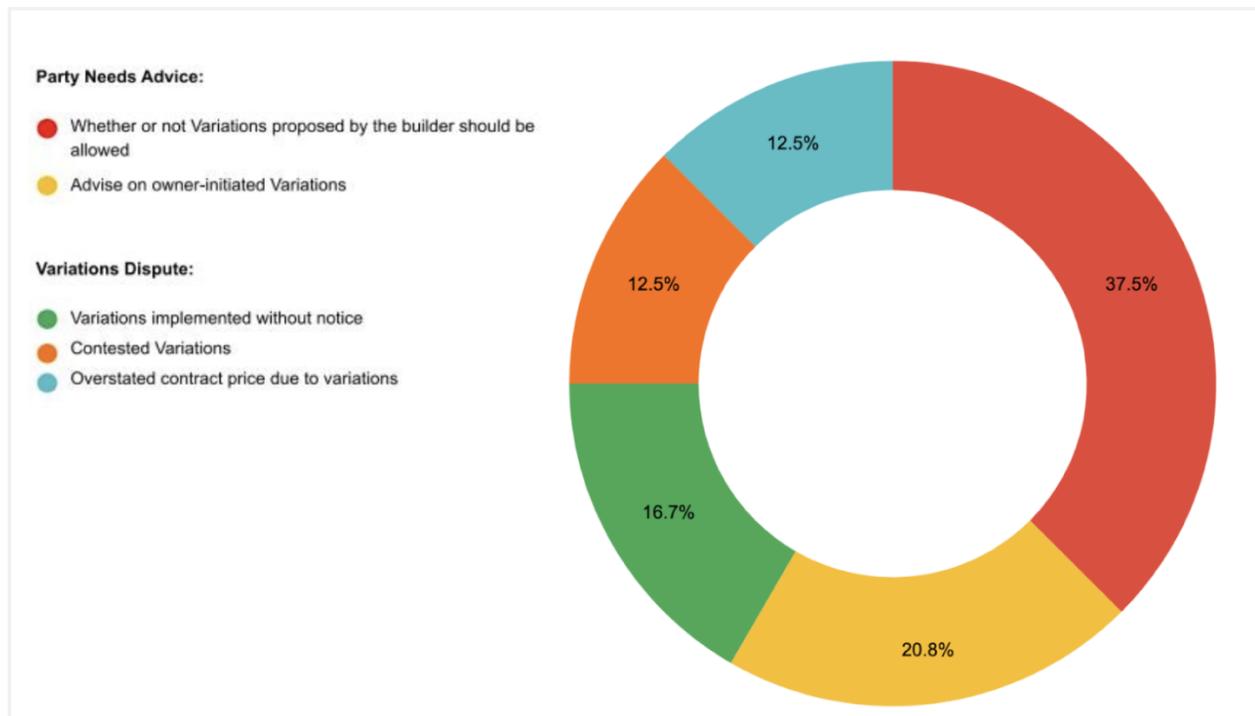
In the preceding section, we saw that Variations aren't inherently bad - that there is a procedure to be followed to ensure that the Variations are valid, and hence, are allowed to affect the cost of the build.

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On the other hand, **there are instances when Variations become a source of building dispute**, or may potentially become a source of dispute.

The graph below shows the typical scenarios when Variations may be, or have become, a problem:



From the above, we can see that the most common Variations issue that clients need advice on are on **whether or not Variations proposed by the builder should be proper and should be allowed** (37.5%); while the most common Variations disputes are those having to do with **unconsented deviations from the Plans and Specifications** (29.2%).

What to do when you don't agree with the Variations

Your contract has clauses that tell you what you can do if and when the builder makes Variations that you don't agree with, or when the Variations you agreed to results in a price dispute. These usually involve sending them a breach notice, and a [dispute resolution procedure](#).

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If you're using the HIA's NSW Residential Building Contract for New Dwellings, you'll find the relevant provisions here:

Clause 35. Dispute Resolution

- 35.1 If a dispute arises then a party must give written notice to the other party setting out the matter in dispute.
- 35.2 The **builder** and the **owner** must meet within **10 working days** of the giving of the notice to attempt to resolve the dispute or to agree on methods of so doing.
- 35.3 If the dispute is resolved the parties must write down the resolution and sign it.
- 35.4 The parties agree that anything done or said in the negotiation cannot be revealed in any other proceeding.



If you're using the Master Builders (BC4) Residential Building Contract, you'll find the dispute resolution clause here:

26. Dispute Resolution

Reference to NSW Fair Trading Guide to Standards & Tolerances

- (a) The parties agree that where a property of an item of work performed by the **Builder** satisfies the requirements of the Guide to Standards and Tolerances that property will not cause that item of work to be defective. However if the item of work does not satisfy the requirements of the Guide to Standards and Tolerances that alone will not be sufficient to determine such item to be defective, being a matter to be determined in the context of the Works.

Notify the other party of matters in dispute

- (b) If any dispute or difference (a dispute) concerning this Agreement or work arises between the **Owner** and the **Builder** then the party saying there is a dispute **must** give the other **written notice of the dispute**.

Parties must meet and seek to resolve dispute

- (c) Within **ten (10) business days** after the giving of such a notice the parties must confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means such as mediation, expert determination or arbitration. The mediator, expert or arbitrator is set out at **Schedule**

2 item 8. At any such conference each party must be represented by someone having authority to settle the dispute.

- (d) Any agreement reached at the above meeting is to be recorded in **writing** and a copy kept by both parties. An agreement may be relied upon as an addendum to this contract and used as a response to any subsequent action or inaction by a party to this agreement.

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If you're using the government-issued [Home Building Contract for Work Over 20,000](#), you'll find the relevant provisions here:

Note: If you have a dispute you should first discuss the matter with the other party. Serious disputes can often be avoided by good communication between owner and contractor. It is suggested that in the event of a dispute the parties meet as soon as possible and by discussion endeavour to resolve the matter. Make sure you understand your obligations under the contract. If necessary, obtain independent advice. The dispute resolution procedure is aimed at reducing the need for possible costly litigation. Fair Trading can investigate a complaint from an owner and may issue an order requiring a contractor to rectify or complete work or to rectify any damage. For further details refer to Part 3A Division 2 Home Building Act 1989.

o *If the dispute cannot be resolved informally the owner may contact Fair Trading for information.*

Note: A copy of any notice given under the contract should be kept. Where a notice is given other than by handing to the other party, the person who gave notice should follow up to ensure it is received.

Clause 27 Disputes

If the owner or contractor considers that a dispute has arisen in relation to any matter covered by this contract, either during the progress of the work, after completion of the work or after the contract has been terminated, that person must promptly give to the other party written notice of the terms of dispute.

If the dispute is not resolved informally following such notification, the parties may confer with a mutually agreed third party whose role will be to assist in the resolution of the dispute by mediation or expert appraisal of the work.

If the parties do not agree to confer with a third party to assist in the resolution of the dispute, or if the dispute is not resolved following the assistance of such a third party, the owner may notify Fair Trading that a building dispute exists and seek the assistance of Fair Trading to resolve the dispute.

Even if a dispute has arisen the parties must, unless acting in accordance with an express provision of this contract, continue to perform their obligations under the contract so that the work is completed satisfactorily within the agreed time.

Clause 28 Giving of notices

If the contract requires or permits a party to give a notice, consent, or other communication in writing to the other party, it must be given by either:

- handing it to the other party
- leaving it with a person, apparently over the age of 16, at the other party's business or residential address, or
- by registered post to the last known address of the other party.



If you're using a **standard form contract**, make sure they contain terms analogous to the above. Best to consult a construction lawyer for review and advice in such case.

If dispute resolution is not the solution

In cases where the Variations dispute remains unresolved despite having undergone dispute resolution procedures, you may take your matter to the [Office of Fair Trading](#). If after that, the dispute still remains unresolved, you have further recourse with the [NSW Civil and Administrative Tribunal \(NCAT\)](#), and final recourse with the courts.

How We Can Help

If you are building your home, and you want to know if you should go ahead with proposed Variations, or if you want to propose Variations yourself, or if you need advice on whether the Variations made are proper or not, and in the latter case, if you need assistance in resolving a Variations dispute, feel free to book a consult with our specialist construction lawyer.

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